Hwang-DBS Securities v Harun Bin Jasin

HIGH COURT (PENANG) - CIVIL APPEAL NO 12-304 OF 2002
KAMALANATHAN RATNAM J
13 OCTOBER 2003

Securities *— Stockbroker — Shares — Shares pledged to remisier by customer — Failure to dispose of shares — Trading loss incurred by customer — Whether stockbroker had a duty to mitigate customer's loss*

Securities *— Remisier — Negligence — Failure to dispose customer's shares quickly — Loss occasioned thereby Whether remisier negligent — Whether proper to recover such loss from customer*

The plaintiff sued the defendant for trading losses amounting to RM160,693.31 and interest of RM51, 463.28. The record revealed that on 22 April 1997, a sum of RM160, 693.31 was due and owing by the defendant to the plaintiff. On the same day the defendant pledged his 25,000 Denko Industrial Corporation Berhad ('Denko') shares to the plaintiff's remisier. At that material date, a Denko share was valued at RM11 at its highest and RM10.30 at its lowest. However the plaintiff did not sell the shares to recover its losses. Whilst the defendant admitted owing the sum of RM160, 693.31 he claimed he was not liable for the interest amounting to RM51, 463.28. The defendant claimed that once he had pledged his shares it was the plaintiff's duty to have sold the shares on the same day to recover its losses forthwith. The defendant pointed out that had the 25,000 shares been sold on that date, the plaintiff would have obtained RM275,000 which would have more than covered its losses. In the sessions court, the plaintiff's claim was allowed and the defendant thus appealed to the High Court.

Held, setting aside the judgment of the sessions court in respect of the interest sum only:

(1) There was no plausible reason given by the plaintiff as to why it did not sell the shares pledged. On the facts, the total price of the shares when sold would have been more than sufficient to recover the losses. There was a duty upon the plaintiff to have mitigated the loss the defendant had to bear. Since time was an essential factor for consideration, it was incumbent upon the plaintiff to have protected its own interest and at the same time ensure that the interest of its client was also protected by disposing of the shares when it was at its highest (see pp 768H–769B).

(2) The plaintiff confirmed that the remisier into whose account the defendant's shares were put, was its employee. The plaintiff treated the pledged shares as belonging to the remisier. The remisier was obviously negligent in failing to dispose of the shares quickly. It was therefore totally inappropriate for the plaintiff to

A attempt to recover the interest from the defendant due to the negligence of its own employee (see p 769B–E).

[Bahasa Malaysia summary

B Plaintif telah menyaman defendan untuk kerugian perniagaan yang berjumlah RM160,693.31 dan faedah RM51,463.28. Rekod telah menunjukkan bahawa pada 22 April 1997, satu jumlah RM160,693.31 kena dibayar an terhutang oleh defendan kepada plaintif. Pada hari yang sama defendan telah menjaminkan 25,000 saham Denko Industrial Corporation Bhd ('Denko') kepada remisier
C plaintif. Pada tarikh yang mapan itu, saham Denko bernilai RM11 pada tahap paling tinggi dan RM10.30 pada tahap paling rendah. Akan tetapi plaintif tidak menjual saham-saham itu untuk mendapatkan kembali kerugian beliau. Walaupun defendan mengaku berhutang sebanyak RM160,693.31 beliau menyatakan bahawa
D beliau tidak bertanggungjawab untuk faedahnya berjumlah RM51,463.28. Defendan mendakwa bahawa setelah beliau menjaminkan saham-saham beliau ia adalah tanggungjawab plaintif untuk menjual saham-saham itu pada hari yang sama untuk mendapatkan kembali kerugian beliau. Defendan mengatakan bahawa jika saham-saham itu dijual pada hari tarikh itu, plaintif boleh
E mendapat RM275,000 yang boleh mendapat kembali kerugian beliau. Di dalam mahkamah sesyen, tuntutan plantif dibenarkan dan defendan telah merayu kepada Mahkamah Tinggi.

Diputuskan, menolak penghakiman mahkamah sesyen berkenaan
F jumlah faedah:

(1) Plaintif tidak memberi alasan yang munasabah mengenai mengapa beliau tidak menjual saham-saham yang dijaminkan itu. Pada fakta-fakta harga penuh saham-saham itu selepas dijual boleh mendapat kembali kerugian itu. Terdapat tanggungjawab
G pada plaintif untuk mengurangkan kerugian defendan. Memandangkan bahawa masa adalah faktor yang penting untuk dipertimbangkan ia adalah perlu untuk plaintif melindungi kepentingan beliau sendiri dan pada masa yang sama memastikan bahawa kepentingan anak guam beliau terlindung dengan menjual saham-saham pada masa ia bernilai paling tinggi (lihat
H ms 768H–769B).

(2) Plaintif telah mengesahkan bahawa remisier yang memegang saham-saham defendan adalah pekerjanya. Plaintif telah menganggap saham-saham yang dijaminkan sebagai saham-saham remisier itu. Remisier itu adalah cuai kerana tidak menjual
I saham-saham itu dengan cepat. Oleh itu ia tidak berpatutan untuk plaintif cuba mendapat kembali faedah daripada defendan oleh kerana kecuaian pekerjanya (lihat ms 769B–E).

Notes

For cases on negligence of remisiers, see 11 *Mallal's Digest* (4th Ed 1996 Reissue) para 776.

For cases on stockbrokers, see 11 *Mallal's Digest* (4th Ed 1996 Reissue) paras 791-792.

Cheah Ee Keong (*Peter Huang & Richard*) for the plaintiff.
Latsmanan Ponnusamy (*Khor Gaik Thiam & Latsmanan*) for defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff is a stock-broking firm trading in shares and is a member of the Kuala Lumpur Stock Exchange. The defendant employed the plaintiff to trade in shares.

As a result of trading and due to contra losses, the plaintiff sued the defendant for a sum of RM217,209.48 made up as follows:

(a)	Trading losses	RM 60,693.31
(b)	Interest	RM 51,463.28

The defendant began trading with the plaintiff on 9 April 1996 and as of 22 April 1997 a sum of RM160,693.31 was due and owing to the plaintiff. On the same day, and upon demand by the plaintiff, the defendant signed the Security Transfer Request form, pledging his 25,000 shares in Denko Industrial Corporation Bhd ('Denko') to the account of one Abdul Rahman bin Abdullah, the remisier working for the plaintiff, and who was also handling the defendant's account. A Denko share, on the same date, was RM11 at its highest, and RM10.30 at its lowest.

Findings of the court

It is the defendant's case (as confirmed at trial) that whilst he admits owing a sum of RM160,693.31, he is not liable for the interest amounting to RM51,463.28. The defendant argued that once he had pledged his 25,000 shares in Denko, it was the duty of the plaintiff to have sold the shares on the same day to recover the plaintiff's losses forthwith. In fact it was pointed out by the defendant that had the 25,000 shares in Denko been sold on that date, the plaintiff would have obtained RM275,000 which more than covered its losses. In fact the defendant pointed out that the said shares have not been sold to date.

There is no plausible reason given by the plaintiff as to why it did not sell the shares pledged. This is not a case of the defendant having bought shares and not being able to pay for it, whereby the plaintiff would be obliged to force-sell the shares after the due date for payment. In this case the plaintiff had the shares pledged as security readily available and yet the plaintiff did not avail itself of the best opportunity of recovering its losses.

If for instance the total worth of the pledged shares would not have been sufficient to satisfy the debt due to the plaintiff, there is an arguable case for the plaintiff to have held on to the shares in the event the price went up. But in this case the total price of the shares when sold would have been more than sufficient to recover the losses. There was a duty upon the plaintiff to have mitigated the loss the defendant had to bear. Since time is an essential factor for consideration, it was incumbent upon the plaintiff to have protected its own interest and at the same time ensuring that the interest of its client is also protected by disposing of the shares when it was at its highest. In this case the plaintiff failed to protect both the interests.

There is another factor to be considered. The plaintiff has confirmed that the remisier, into whose account the defendant's pledged shares were put, was its employee. Yet there was no explanation why the shares were not held by the plaintiff. In any case whether the pledged shares were in the account of the plaintiff or the remisier, makes no difference to the defendant's case because the plaintiff ought to have instructed its remisier to sell the pledged shares. However the senior general manager of the plaintiff testified that so far as the plaintiff was concerned the pledged shares were treated as belonging to the remisier and not to the defendant. Considering such an admission it is surprising that the plaintiff even initiated this action. The defendant's shares were put into the account of the remisier and the plaintiff treated those pledged shares as belonging to the remisier. Obviously the remisier was negligent in failing to dispose of the shares quickly. It is therefore totally inappropriate for the plaintiff to attempt to recover the interest from the defendant, due to the negligence of its own employee.

On these facts I had no hesitation in allowing the defendant's appeal and setting aside the judgment of the lower court, in allowing the plaintiff's claim in respect only on the interest sum.

In respect of the defendant's counterclaim that was dismissed, Mr Cheah for the plaintiff only relied on the fact that the counterclaim was not pleaded with sufficient detail. I do not agree. Whilst the defence and counterclaim as pleaded cannot be said to be a pristine piece of perfection, they contain sufficient details to sustain the counterclaim which I allowed with costs.

For purposes of calculation, I fixed the share price of the 25 lots pledged to be calculated at the rate of RM10.30 per share being the lowest price on the day the shares were pledged.

Judgment of the sessions court set aside in respect of the interest sum only.

Reported by Andrew Christopher Simon